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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 43332
	)	
v.	)	ADA COUNTY NO. CR 2014-12367
	)	
DOUGLAS EARL MEYER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

**REPLY BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

**HONORABLE RICHARD D GREENWOOD**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Douglas Meyer appeals, contending the district court erred when it denied his pretrial motion for a necessity defense jury instruction, based on his and his wife's medical needs, in his possession of marijuana case. In response, the State argues that, based on other potential factors, Mr. Meyer has not actually proved that defense, and that the Idaho Supreme Court opinion, which the State concedes supports Mr. Meyer's argument, should be overruled.

The State's arguments are premised on misunderstandings and misapplications of the relevant law in Idaho. The result is that the State is effectively and improperly asking this Court to invade the province of the jury and weigh the proffered evidence on the necessity defense, and to usurp the power of the Legislature and abrogate the common law as to the availability of the necessity defense. As such, this Court should reject those arguments.

Because the necessity defense is applicable in Mr. Meyer's case and a reasonable view of the proffered evidence shows he has met his *prima facie* burden as to that defense, this Court should reverse the erroneous denial of his motion for the necessity defense jury instruction and remand this case for further proceedings.

### Statement of Facts and Course of Proceedings

The statement of facts and course of proceedings were previously articulated in Mr. Meyer's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

Whether the district court erred when it denied Mr. Meyer's request for a jury instruction on his necessity defense.

## ARGUMENT

### The District Court Erred When It Denied Mr. Meyer's Request For A Jury Instruction On His Necessity Defense

#### A. The State's Arguments Effectively Call For This Court To Usurp The Jury's Authority And Weigh The Proffered Evidence Itself To Determine Whether It Actually Establishes The Necessity Defense

The role of the judge in determining whether to instruct the jury on an affirmative defense is necessarily limited to evaluating whether, *if the jury were to believe the evidence proffered by the defendant*, that evidence would meet the elements of the affirmative defense. *State v. Chisholm*, 126 Idaho 319, 321 (Ct. App. 1994) (citing *United States v. Bailey*, 444 U.S. 394, 416 (1980)). This is a product of the constitutionally-based principle that the jury is the sole arbiter of whether the evidence presented is sufficient to make out the affirmative defense. See, e.g., *Bailey*, 444 U.S. at 416; *State v. Hastings*, 118 Idaho 854, 856 (1990). Therefore, if any reasonable view of the facts supports the requested affirmative defense instruction, the district court should give that instruction. *State v. Beeks*, 159 Idaho 223, 231-32 (Ct. App. 2015); see *Hastings*, 118 Idaho at 856 (holding that the defendant's evidence about her rheumatoid arthritis and use of marijuana to alleviate the symptoms thereof was sufficient to meet her *prima facie* burden on the necessity defense).

In applying the proper standard of review in this case, it is important to remember that the State charged Mr. Meyer in the alternative – either possession with intent to deliver or simple possession in excess of three ounces. (R., pp.48-49.) Thus, the necessity defense instruction was proper if it spoke to either of the alternative charges. Compare *State v. Tadlock*, 136 Idaho 413, 415 (Ct. App. 2001) (holding that the



requested instruction was proper as to the lesser included charge of simple misdemeanor possession alleged in that case, but the failure to give the instruction was harmless in that case because the jury had convicted on the greater charge). Here, unlike *Tadlock*, the simple possession charge is not a lesser included offense and it is the only basis for Mr. Meyer's current judgment of conviction. (R., pp.48-49, 179.) On the simple possession charge, then, *Hastings* is practically identical to Mr. Meyer's case. (See App. Br., p.9.) In both cases, the defendant presented evidence of his or her medical condition and use of marijuana to alleviate the symptoms thereof. According to *Hastings*, that is enough to satisfy Mr. Meyer's *prima facie* burden for the necessity defense. See *Hastings*, 118 Idaho at 855-56. In fact, the State concedes that *Hastings* supports Mr. Meyer's argument in this regard. (Resp. Br., p.9.)

Nevertheless, the State argues that, because Mr. Meyer could have made other arrangements, and so, not brought the marijuana to Idaho, he has not actually established a necessity defense. (Resp. Br., pp.7-10.) It also asserts Dr. McLennon's medical evaluation of Mr. Meyer, confirming that his condition merits medicinal use of marijuana, is unreliable because of the doctor's personal opinions about marijuana. (Resp. Br., p.7.) Those arguments present a jury question, not an argument that Mr. Meyer failed to meet his *prima facie* burden. Compare *Hastings*, 118 Idaho at 856 ("It is for the trier of fact to determine whether or not she has met the elements of that defense."). Therefore, those arguments are improper and should be rejected.

One reasonable view is that the jury believes Mr. Meyer's proffered evidence – showing he needed to have his marijuana with him as he travelled through Idaho because of his medical conditions, and he needed to have his wife's medicinal

marijuana with him as he, the only designated provider of her prescribed medication, was going to meet her for an extended vacation – and disbelieves the State’s argument that there were other arrangements he could have made, such as not traveling with the marijuana. Similarly, even if the State disagrees with Dr. McLennon’s conclusions, that does not mean the jury had to disbelieve the doctor as well. The jury reasonably could find Dr. McLennon credible, and so, based on the proffered evidence, reasonably find the elements of the necessity defense. *Compare Hastings*, 118 Idaho at 855-56.

Since the State’s arguments go to the weight, not the admissibility, of Mr. Meyer’s proffered evidence, the State is effectively asking this Court to invade the province of the jury and weigh the proffered evidence. Such arguments are improper. *See, e.g., Hastings*, 118 Idaho at 856. Rather, as discussed in depth in the Appellant’s Brief, pages 7-16, Mr. Meyer met his *prima facie* burden under the proper standard. *Compare id.* at 855-56. As such, under the proper standard, the district court erred in denying Mr. Meyer’s motion for an instruction on that defense.

The State also contends the necessity defense should not be applied in this case based on two melodramatic predictions – first, that finding Mr. Meyer has met his *prima facie* burden would “essentially allow the defense as a matter of law in ‘medical marijuana’ situations. Second, such a holding effectively creates a medical exception to Idaho’s marijuana laws.” (Resp. Br., p.10.) Both predictions drastically overstate the effects of properly applying Idaho law in this case, and both are actually empirically disproved.

As to the State’s first assertion, defendants seeking to raise the necessity defense in medical marijuana cases are still obligated to make a *prima facie* showing

that the defense is proper on the facts of their cases before they can present that defense to a jury. See *Hastings*, 118 Idaho at 855-56. Thus, in the twenty-six years since *Hastings* determined that defense was potentially available in such cases, the courts have continued to bar that defense if the defendant failed to meet his *prima facie* burden. See, e.g., *State v. Beavers*, 152 Idaho 180, 184 (Ct. App. 2010) (finding that the defendant had failed to present evidence on the third prong of the necessity defense); *Tadlock*, 136 Idaho at 415 (explaining that the defendant had not presented evidence on the first prong of the necessity defense, such as would justify his intent to deliver marijuana under that defense). Therefore, the idea that allowing the necessity defense to be presented when the requisite evidence is present, such as in *Hastings* or this case, will result in all defendants in all medical marijuana cases being able to present that defense as a matter of law is empirically disproved.

Similarly, the fact that no medical exception to Idaho's marijuana laws has developed in Idaho's jurisprudence since the *Hastings* Opinion was issued empirically disproves the State's second prediction. Most of the cases citing *Hastings* do not deal with medical marijuana at all. See, e.g., *State v. Korn*, 148 Idaho 413, 417-18 (2009) (citing *Hastings* for its discussion of the elements of the necessity defense in an unlawful possession of wild or exotic animals case). And, in regard to the two of the cases which cite *Hastings* and actually deal with medicinal marijuana, neither establishes the wholesale exception the State predicts. See *Beavers*, 152 Idaho 180; *Tadlock*, 136 Idaho 413. Rather, those two cases reinforce the restrictions on the application of the defense. See *id.* Therefore, the State's prediction that allowing a

necessity defense in such cases like *Hastings* or Mr. Meyer's will judicially create a medical exception to possession of marijuana is wholly unfounded.

Ultimately, though, this Court should apply the law as it exists in regard to the necessity defense. Mr. Meyer presented evidence which, if believed by the jury, would establish each element of the proposed necessity defense. Therefore, under Idaho law, Mr. Meyer, like the defendant in *Hastings*, was entitled to an instruction on the necessity defense. The district court erred by denying his request for that instruction.

B. The State's Argument To Overrule *Hastings* Effectively Asks This Court To Invade The Province Of The Legislature And Abrogate The Common Law

Given its concession that Idaho law, per *Hastings*, supports Mr. Meyer's argument, the State argues that this Court should change the law in that regard by overruling *Hastings*. (Resp. Br., pp.9-14.) As the party seeking to set aside the rule of *stare decisis*, the State bears the burden of proving the prior decision is "manifestly wrong," "unjust or unwise," or "overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990).

The State has failed to carry this burden because its argument fundamentally misunderstands the operation of the common law within Idaho's legal framework. As a result, the State is effectively asking this Court to usurp the Legislature's power to decide whether the operation of the common law should be curtailed. Therefore, overruling *Hastings* would not vindicate, but rather, would obfuscate, the plain, obvious principles of Idaho law and would result in new injustices heretofore avoided by the

*Hastings* decision. As such, this Court should reject the State's invitation to overrule *Hastings* because it is not manifestly wrong under Idaho law.

The necessity defense existed at common law. See, e.g., *Hastings*, 118 Idaho at 855. The common law has been an intrinsic part of Idaho's legal framework dating back to territorial days: "In 1864, the [L]egislature adopted what is now codified as I.C. § 73-116," which incorporates the common law into Idaho's legal framework insofar as it is not inconsistent with or repugnant to other laws passed. *State v. Pina*, 149 Idaho 140, 146 (2010), *abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889 (2011); see also IDAHO CONST. Art XXI, § 2 (providing that all territorial laws would remain in effect upon gaining statehood). As a result of that incorporation, it is a "well-established principle of law in this jurisdiction that it is the province of the [L]egislature to modify the rules of the common law." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 719 (1990). Naturally, the Legislature can do that by either expressly saying so or by passing an act which is not reconcilable with the common law. See *id.* at 717. As such, the necessity defense is in effect in Idaho unless the Legislature curtails it by some statutory enactment. See *Olsen*, 117 Idaho at 719.

To that point, the *Hastings* Court necessarily concluded that the common law necessity defense is not repugnant to or inconsistent with Idaho's Controlled Substance Act (CSA) because *Hastings* expressly allowed the defendant to present that defense to a charge of unlawful possession of marijuana under that act. *Hastings*, 118 Idaho at 856; see, e.g., *Arave v. Creech*, 507 U.S. 463, 471 (1993) (indicating there is a presumption that the judge knows and correctly applies the law); *Bradbury v. Idaho Judicial Council*, 149 Idaho 107, 118-19 (2009) (same). Since "the rules of common law

are not to be changed by doubtful implication,” Idaho’s CSA did not change the operation of the common law defense of necessity in Idaho. *Statewide Const., Inc. v. Pietri*, 150 Idaho 423, 429 (2011) (internal quotation omitted), *abrogated on other grounds by Verska*, 151 Idaho 889.

That means, since the *Hastings* decision was issued, it has been the Legislature’s sole prerogative to amend Idaho’s CSA if it determined the common law defense of necessity should no longer apply in that context. *Compare Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 890 (1970) (noting that, when the Idaho Supreme Court determined the common law prevented a cause of action from surviving the death of a party, “[t]he [L]egislature promptly thereafter struck down the ruling of the Court in Bullock<sup>[1]</sup> by the enactment of [a statute] permitting the survival of [such] an action”) (emphasis added), *overruled on other grounds as stated in Evans v. Twin Falls County*, 118 Idaho 210, 215-16 (1990). The Legislature has not made any move to amend the CSA to proscribe the application of the common law necessity defense since the *Hastings* Opinion was issued. *See generally* I.C. §§ 37-2701, *et seq.* Therefore, the common law necessity defense continues to apply in that context.

Thus, the State’s argument for this Court to overrule *Hastings* and forbid application of the common law necessity defense to the CSA is, effectively, an argument for this Court to abrogate the operation of the common law on its own prerogative. That is something the courts are not authorized to do: “it is the province of the Legislature, and not of the court, to modify the rules of common law. *The court has*

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<sup>1</sup> *Moon v. Bullock*, 65 Idaho 594, \_\_\_, 151 P.2d 765, 767 (1944), *overruled on other grounds as stated in Doggett*, 93 Idaho at 890.

*no more right to abrogate the common law than it has to repeal the statutory law.” Bullock*, 151 P.2d at 771 (internal quotation omitted) (emphasis added); cf. *Moon v. North Idaho Farmers Ass’n*, 140 Idaho 536, 544 (2004) (quoting *Bullock* for this point). Therefore, the State’s request for this Court to overrule *Hastings* is improper and should be rejected.

Besides, *Hastings* is not an incorrect decision. The mere fact that a certain action was criminalized does not mean that affirmative defenses are *ipso facto* irreconcilable with that criminalization. While contrary in outcome, the two concepts are designed to operate coherently: the purpose of an affirmative defense is that an otherwise-criminalized action will be excused based on a particular set of facts. See, e.g., *Dixon v. United States*, 548 U.S. 1, 6-7 (2006). Thus, *Hastings*’ conclusion – that medical necessity can be an affirmative defense to possession of marijuana – is not inconsistent with plain and ordinary principles of Idaho law.

In fact, the Legislature’s actions in 2015 demonstrate that a medical necessity exception is not repugnant to or inconsistent with Idaho’s CSA. Both houses of the Sixty-Third Legislature passed a bill which would have created an exception within Idaho’s CSA to allow possession of cannabidiol oil, a derivative of the marijuana plant, in limited circumstances because the Legislature recognized the beneficial use of cannabidiol oil in treating “intractable seizure discord[s].” S1146, 63rd Leg. (Idaho 2015) (not enacted due to gubernatorial veto). Therefore, the Legislature’s actions indicate application of a medical necessity defense, like the one recognized in *Hastings*, is not manifestly wrong under Idaho law.

Finally, the State contends that this Court should overrule *Hastings* by adopting the rationales used in *United States v. Oakland Cannabis Buyer's Cooperative*, 532 U.S. 483 (2001). (Resp. Br., pp.11-14.) However, the proper understanding of the operation of common law within Idaho's legal framework discussed *supra* reveals the State's reliance on *Oakland Cannabis* to be wholly misplaced. That is because *Oakland Cannabis*'s decision is based on the relationship between federal law and common law, a relationship that is drastically different than the relationship between Idaho law and common law.

Specifically, *Oakland Cannabis*'s decision – that, since the federal CSA forbids possession of marijuana “except as provided by this subchapter,” and there is no provision of that subchapter allowing for a necessity defense, the necessity defense did not apply to possession of marijuana under the federal CSA – was dictated by the fact that “[t]here is no federal general common law.” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *cf. Oakland Cannabis*, 532 U.S. at 490 (“under our constitutional system . . . federal crimes are defined by statute rather than by common law.”) (citing *United States v. Hudson*, 7 Cranch 32, 34 (1812)). Essentially, *Oakland Cannabis*'s decision is that, since the common law did not apply generally under federal law, the common law necessity defense could not apply absent an act of Congress. *See Oakland Cannabis*, 532 U.S. at 489-95.

This more complete understanding of the decision in *Oakland Cannabis* demonstrates its rationales are diametrically opposed to Idaho law. The prevailing rule in the federal context is: “Whether, as a policy matter, an exemption *should be created* is a question for legislative judgment, not judicial inference.” *Oakland Cannabis*, 532



U.S. at 490 (internal quotation omitted) (emphasis added). By contrast, the prevailing rule in Idaho law is: “the statutory enactment is essential *to repeal, abrogate, or change* the rules or doctrine of the common law.” *Bullock*, 151 P.2d at 771 (emphasis added); *cf. Pietri*, 150 Idaho at 429. That means, while the necessity defense is not available in the federal context unless Congress specifically authorizes its use, *in Idaho*, the necessity defense *is* available unless the Legislature specifically circumscribes its applicability. This fundamental difference in the function and force of common law within the respective legal frameworks renders *Oakland Cannabis*’s rationales inapplicable to Idaho law.

In fact, the Supreme Court made it clear that its decision in *Oakland Cannabis* was narrow and applied only to the interpretation of the federal code: “we share Justice Stevens’ concern for showing respect for the sovereign States that comprise our Federal Union. However, we are construing an Act of Congress, not drafting it.” *Oakland Cannabis*, 532 U.S. at 494 n.7 (internal quotations omitted); *cf. id.* at 499-500 (Stevens, J., concurring in judgment) (explaining that the majority opinion contained “broad dicta” and a narrow holding which was a product of the particular way the case arose below, and the particular question considered on appeal). Justice Stevens’ observation that *Oakland Cannabis* is narrow in scope is accurate.

The alleged violation of the federal CSA in that case arose in contempt proceedings relating to the Oakland Cannabis Buyer’s Co-op’s refusal to comply with a preliminary injunction to stop selling marijuana. *Oakland Cannabis*, 532 U.S. at 487. During those proceedings, the co-op moved to amend the terms of the injunction based on the medical needs of its customers. *Id.* at 487-88. Ultimately, the co-op purged its

contempt, leaving the denial of its motion to amend the injunction as the only issue on appeal. *Id.* at 488. The Ninth Circuit reversed, remanding the case for entry of an amended injunction with a medical necessity exception. *Id.* at 488-89. The Supreme Court granted *certiorari* to discuss the propriety of the amended injunction in light of the language of the federal CSA. *Id.* at 489. Therefore, given its unique procedural history and basis for decision, the cross-application of *Oakland Cannabis*'s rationales regarding the operation of the federal code on the terms of an injunction issued under federal civil law to Mr. Meyer's state criminal case is even more dubious.

In fact, some states have refused to apply *Oakland Cannabis* to questions of state law for just such reasons. See, e.g., *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 538 n.5 (Mich. 2014) (explaining that *Oakland Cannabis* held "in a federal prosecution under the CSA, there was no medical necessity defense available under federal law, regardless of whether that defense would be available under state law."); *People v. Mower*, 49 P.3d 1067, 1071 n.2 (Cal. 2002) (explaining *Oakland Cannabis* "involves the interpretation of federal law, has no bearing on the questions before us, which involve state law alone."). This Court should similarly refuse to extend the rationale of *Oakland Cannabis* because of the fundamental difference in the operation of Idaho's state law and federal law on this issue.

Under Idaho law, the common law necessity defense is available per statute, and the power to curtail that availability is solely the Legislature's. The State has not presented any reason, apart from the inapplicable rationales of *Oakland Cannabis*, for this Court to overrule the case which recognizes the Legislature has not done so. As such, the State is effectively asking this Court to do something beyond its authority –

abrogate the common law. Therefore, the State has failed to carry its burden to justify overruling *Hastings*.

Since Mr. Meyer has met his *prima facie* burden under *Hastings* to show the evidentiary basis for the necessity defense in his case, he should have been allowed to present that defense to a jury with appropriate instructions. The district court erred by denying his motion for the proper instructions. Therefore, this Court should remand this case so that a jury can determine whether the evidence actually proves the claimed defense.

#### CONCLUSION

Mr. Meyer respectfully requests this Court reverse the order denying his motion for a necessity instruction, vacate his conviction, and remand this case for further proceedings.

DATED this 29<sup>th</sup> day of April, 2016.

\_\_\_\_\_/s/\_\_\_\_\_  
BRIAN R. DICKSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29<sup>th</sup> day of April, 2016, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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RICHARD D GREENWOOD  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

RANSOM J BAILEY  
ADA COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

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CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BRD/eas